STATE OF MICHIGAN

COURT OF APPEALS

DEBORAH SIX and RICHARD SIX,

Plaintiffs-Appellants,

v

ILIA ARNOLD, AGILITY HEALTH, INC., TRINITY HEALTH-MICHIGAN, d/b/a MERCY HOSPITAL CADILLAC, and MUNSON MEDICAL CENTER,

Defendants-Appellees.

UNPUBLISHED
July 15, 2014

No. 311093
Grand Traverse Circuit Court
LC No. 2010-028212-NH

Before: MURRAY, P.J., and O'CONNELL and BORRELLO, JJ.

PER CURIAM.

In this medical malpractice case, plaintiff Deborah Six[1] appeals as of right the trial court's entry of judgment on the jury's verdict of no cause of action. We affirm.

This case arose out of plaintiff's allegations of negligence against occupational therapist Ilia Arnold, and Arnold's employer, defendant Agility Health, Inc. In addition, plaintiff alleged negligence against medical care providers employed by defendant Munson Medical Center.

Plaintiff argues that the trial court committed error requiring reversal when it refused to grant two of plaintiff's challenges for cause during voir dire. We review this issue for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 236, 251; 445 NW2d 115 (1989). In *Poet*, our Supreme Court explained the analysis applicable to the issue:

> a trial court commits error requiring reversal when the record reveals that: (1) the court improperly denied a challenge for cause, (2) the aggrieved party exhausted

[1] The claims of plaintiff Richard Six are derivative because of his status as Deborah's husband. Accordingly, we refer to Deborah as plaintiff, and her husband as Richard. We note that in the record, plaintiff's name is variously spelled as both "Deborah" and "Deboriah." We use the spelling "Deborah" because that is the spelling used in the docketing sheet plaintiff filed in this appeal.

> all peremptory challenges, (3) the party demonstrated a desire to excuse another subsequently summoned juror, and (4) the juror whom the party wished later to excuse was objectionable." *Id.* at 258-59.

In this case, at least two factors of the *Poet* analysis are missing: factor one, regarding the trial court's decision on challenges for cause, and factor four, regarding a desire to excuse an objectionable juror.

At the beginning of the jury selection process, the court briefly described the nature of the case and identified the parties. The clerk then called the first six potential jurors. Plaintiff took issue with some of the responses from certain jurors, including VanDeVeer and Andriese, and challenged them both for cause. The trial court denied the challenge with respect to VanDeVeer, but sustained as against Andriese. Plaintiff used a peremptory challenge to remove VanDeVeer, who was replaced by Revard, a full-time college student. All parties passed on challenges for cause to Revard and passed on further peremptory challenges. The jury was sworn in and court recessed for lunch.

However, during the recess, Revard told the court that "his life is now in chaos" and that "he would literally fail his classes and believes he is incapable of performing as a juror." The court held that, "due to expressed emotional disability to handle the case with appropriate dignity and clear lack of emotional maturity the Court is going to be excusing him for cause." The other potential jurors had already been excused by then, so the court arranged to contact 10 members of the jury pool at random and have them back the next day. All parties agreed to this procedure.

On the second day of jury selection, the clerk called Wallace to fill Revard's jury seat and called Cady as an alternate. All parties passed on challenges to Wallace, but plaintiff's counsel challenged Cady for cause because of her connection to the nursing profession and because she was not completely certain regarding concerns about future employment with Munson. The court overruled the challenge, and plaintiff's counsel exercised his second peremptory challenge to remove Cady.

After Cady's replacement was dismissed for cause, Flory took a seat on the panel. Flory stated that he is a CPA, and that his clients included registered nurses and physician's assistants. Flory stated that he was a "corporate member" of Munson Medical Center several years ago.[2] Plaintiff's counsel challenged Flory for cause because of this relationship, and Flory's stated opinion that he was "closer to the people who say there ought to be caps [on damages]." The

[2] A corporate member is a volunteer position, which Flory described as:

> Various individuals in the community are asked to participate with various activities, attend meetings and help with the overall input of the hospital, where they are going, what's happening. I sit on the investment committee . . . . And, I came upon that because I was a trustee with the old osteopathic hospital, that hospital was bought and acquired by Munson and they merged."

trial court denied the challenge. Plaintiff's counsel used his third and final peremptory challenge[3] to excuse Flory.

The subsequently summoned juror was Welch. Welch stated she is a certified medical assistant at Bay Area Family care and is not affiliated with any of the defendants. All parties passed on challenges for cause and peremptory challenges. Plaintiff's counsel stated, "Satisfied with the jury."

Trial then progressed for eight days, after which the jury returned a verdict of no cause of action, finding that none of the defendants was professionally negligent. The verdict was unanimous regarding Arnold, and five to one regarding Munson. The court entered judgment for no cause of action in favor of defendants. Plaintiff moved the court for a new trial under MCR 2.611, arguing that the court's failure to excuse VanDeVeer and Flory for cause required plaintiff to exhaust her peremptory challenges that otherwise would have been available to excuse other potential jurors plaintiff found objectionable. The trial court denied plaintiff's motion.

We conclude that the trial court properly denied plaintiff's motion for a new trial. The trial court did not abuse its discretion by refusing to grant plaintiff's challenges for cause. Challenges for cause in a civil case are governed by MCR 2.511(D). The relevant portions of MCR 2.511(D) state:

> It is grounds for a challenge for cause that the person:
>
> * * *
>
> (2) is biased for or against a party or attorney;
>
> (3) shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be;
>
> (4) has opinions or conscientious scruples that would improperly influence the person's verdict;
>
> * * *
>
> (11) has a financial interest other than that of a taxpayer in the outcome of the action.

Plaintiff asserts that Flory's relationship to Munson and its executives through his role as a "corporate member" created potential bias that could not be overcome by Mr. Flory's insistence that he could be fair and impartial. Likewise, plaintiff asserts that VanDeVeer's occupation as a

[3] See MCR 2.511(E)(2).

pharmaceutical sales representative gives him a financial interest other than that of a taxpayer in the outcome of the case.

Plaintiff argues that *Poet* stands for the proposition that a "close question" on a challenge for cause should be decided in favor of the moving party. The cited passage states,

> We agree that a trial judge's exercise of discretion in ruling on challenges for cause should be made with regard for both the parties and their respective claims. When balancing discretionary power with a litigant's right to a fair trial, a trial judge should, in cases where apprehension is reasonable, err on the side of the moving party. For our purposes, apprehension is "reasonable" when a venire person, either in answer to a question posed on voir dire or upon his own initiative, affirmatively articulates a particularly biased opinion which may have a direct effect upon the person's ability to render an unaffected decision. [*Poet*, 433 Mich at 238.]

Thus, *Poet* clearly defines those circumstances when the trial judge should err in favor of the moving party: when the venire person "affirmatively articulates a particularly biased opinion which may have a direct effect upon the person's ability to render an unaffected decision."

Here, the trial court did acknowledge that Flory was somewhat problematic as a juror, stating that "slightly more than a decade ago, [Flory] did have a close relationship with Munson. The trial court concluded, however, that "in the totality of the questioning, [Flory expresses] no hesitancy to hold Munson accountable if they had made an error." Regarding Flory's statement about damage caps, he did not express the opinion as one of particular bias, but rather one of reservation and only slightly in favor of caps. Flory's past connection to Munson and his opinion regarding caps could be grounds for a trial court to remove Flory for cause, but they do not rise to the level of rendering Flory "excusable per se" under *Poet*, 433 Mich at 241, n 13.

The same is true regarding VanDeVeer. Plaintiff was able to have VanDeVeer concede that he had "some type of very indirect financial interest" in Munson, but he had earlier stated that nothing in his experience had led him to believe that rendering a verdict against Munson would adversely affect his business. As the trial court pointed out, in a small community like Traverse City, "[i]n some attenuated way or others, everybody has some sort of relationship with [Munson]." Reasonable minds could disagree regarding whether VanDeVeer had a financial interest in the outcome of the case. As with Flory, it would have been within the range of reasonable and principled outcomes for a trial court to have excused VanDeVeer, but it was also within the range of reasonable and principled outcomes to overrule the challenge and leave VanDeVeer on the jury.

Regarding factor four, we first note that there is nothing in the record to indicate plaintiff timely expressed dissatisfaction with a subsequently summoned juror. Even if plaintiff had expressed dissatisfaction, the subsequently summoned juror, Welch, cannot be considered "objectionable." The *Poet* Court noted that the term "objectionable" does not require proof that a potential juror was excusable for cause, but rather only requires that the potential juror meet the dictionary definition of objectionable as " 'causing or tending to cause objection, disapproval or protest.' " *Poet*, 433 Mich at 241, n 15, quoting *The Random House Dictionary of the English*

Language: Unabridged Edition. Welch indicated she could make a fair and proper decision and that she did not fear any adverse employment consequences if called upon to render a verdict against Munson. Welch worked with physicians, but the case against Munson did not involve the alleged negligence of a physician; it involved the alleged negligence of other medical care professionals. Welch indicated she was comfortable with medical malpractice lawsuits "if it's justified." Welch also indicated she does not have any preconceived idea about damages amounts that are "too high" or "too little." In light of these facts, we conclude that from an objective standard the selection of Welch as a juror could not tend to cause disapproval or protest from plaintiff.

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O'Connell
/s/ Stephen L. Borrello